No. 49043-9-II

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant

v.

DONALD MCELFISH, Respondent

APPEAL FROM THE SUPERIOR COURT

OF COWLITZ COUNTY

THE HONORABLE JUDGE MARILYN HAAN

CORRECTED BRIEF OF RESPONDENT

Marie J. Trombley, WSBA 41410
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Graham, WA
253-445-7920

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I. ISSUE PRESENTED

A. Were the trial court's findings of fact supported by substantial evidence and its conclusions of law supported by the findings?

B. Did the trial court properly exercise its discretion when it granted a motion for a new trial and vacated the judgment and sentence?

II. STATEMENT OF FACTS

1. Trial Testimony

In July 2013, Cowlitz County prosecutors charged Donald McElfish by information with attempted rape in the first degree, indecent liberties- forcible compulsion, kidnapping in the first degree, assault in the second degree with intent to commit a felony with sexual motivation. CP1-2. He was convicted on all counts with the exception of indecent liberties. CP 5.

At trial, Cheryl Miranda ("Miranda") testified that on October 4, 2012, she and a friend spent the night at a home where Mr. McElfish, Brandt Jensen and a few other individuals lived. (5/12/14 RP 9-10). The following day, October 5, Jensen was intoxicated. (5/12/14 RP 12). As he had done on previous occasions, he

accused Miranda of having taken a particular bag from him and told her she had to return it to him. (5/12/14 RP 13-14). When she was unable to produce the bag, he became angry, grabbed her arm and said, "We're going to talk to Donnie [McElfish] about this." (5/12/14 RP 16-17;88). Along with Ron Easly, who was there that day, he walked her down to the garage, where Mr. McElfish lived. (5/12/14 RP 17).

When they arrived at the garage/shop, Jensen screamed at a sleeping McElfish to wake up. (5/12/14 RP 19-20). Miranda said McElfish was not really awake and just sat. (5/12/14 RP 20). Jensen hit her in the face several times and told her to take off her clothing. (5/12/14 RP 24). He pulled out his gun. (5/12/14 RP 26). She complied and Jensen duct taped her to a chair. (5/12/14 RP 25). In the process of duct taping, Jensen cut himself and angrily threatened to stab her. (5/12/14 RP 26). He screamed in her face and threatened to kill her. (5/12/14 RP 33). Jensen told her that she would have to have sex with him, Easly, McElfish and the dog in order to pay for stealing the bag. (5/12/14 RP 34). McElfish did not say or do anything. (5/12/14 RP 29). Easley and Jensen left in order to attend to Jensen's cut finger. (5/12/14 RP 34-35).

Alone with McElfish, she testified he said, "Well, are you going to …get it done, or are you going to get it done before they come back down or –about participating or something." 5/12/14 RP 35). She spoke with McElfish and said that he acknowledged he would never rape someone. (5/12/14 RP 36). She stated he kind of "poked" her breast. (5/12/14 RP 38). In answer to the prosecutor's questioning "Did he try and touch your vagina?" she responded, "just a little—barely….I can't really put my finger on that …he might have." (5/12/14 RP39).

Alone in the room with Mr. McElfish, she removed the duct tape and got up from the chair. He did not stop her. She grabbed one of his shirts. (5/12/14 RP 37;40-41;43). He grabbed it back and said, "Give me that, that's my shirt." (5/12/14 RP 41). She climbed on top of his computer to get out a window. (5/12/14 RP 43). He tried to pull her down and told her to get off of his computer. (5/12/14 RP 43;105). She jumped on his bed and thought he was blocking her from leaving. (5/12/14 RP 44). She reported that Mr. McElfish then opened a sliding glass door and called for Jensen and Easly. (5/12/14 RP 44). She grabbed a small towel and ran out the backdoor. She said he tried to grab

her, but she was already partly out the door and he did not "have much to grab onto" and she ran. (5/12/14 RP 45).

As she ran along the road, she unsuccessfully tried to stop three cars for help. (5/12/14 RP 53). She eventually went to a home and hid on top of a shelf behind some garbage bags in the carport. (5/12/14 RP 55). She left that spot and broke into the home to hide. (5/12/14 RP 58). She grabbed some pajamas, and crawled around the house on the floor with a flashlight. (5/12/14 RP 59). She climbed into a bathroom cupboard and pulled some flowers in front of the door and remained hidden for about an hour. (5/12/14 RP 61). She came out because "my organs were cramping up…my heartbeat was so loud inside there that I thought maybe they could hear it out there if they were in there. Every sound was amplified…" (5/12/14 RP 61).

She left the hiding spot and found some alcohol to drink. (5/12/14 RP 63). She then found a phone and called a friend to come and get her. (5/12/14 RP 64). The woman who owned the home returned and called the police. (5/12/14 RP 68).

2. Recantation

Two years later, based on a declaration by Miranda, Mr. McElfish filed a motion for a new trial on grounds of newly discovered evidence. (CP 18-27). The court granted a hearing and heard testimony on May 10, 2016.

Miranda testified that she had spoken with other people in the community and based on those discussions, an acquaintance named Cindy prepared an affidavit for her. (5/10/16 RP 8). Miranda said that on the day she saw the affidavit she was having a hard time staying awake and felt sick. Cindy told her that if any of the facts were not accurate that they should be changed to the correct facts. (5/10/16 RP 33). Miranda did not change anything. She took the document to the Kalama City Hall, and before a notary signed the document under penalty of perjury. (5/10/16 RP 8-9;CP 25-27).

Miranda testified that she was surprised to learn Jensen received far less prison time than Mr. McElfish, and was concerned that Mr. McElfish was unfairly punished. (5/10/16 RP 7-8). She testified that she had difficulty with trusting people. While she feared that people would be mad at her, the reality was that no one had threatened her on behalf of Mr. McElfish. (5/10/16 RP 44).

She was very concerned, however, that she would be charged with perjury because of the change in her testimony. (5/10/16 RP 35).

Miranda testified fairly similar to her trial testimony and added that Mr. McElfish had no part in beating or threatening her. (5/10/16 RP 47). He appeared to be scared of Jensen and she believed he was acting out of fear. (5/10/16 RP 48). He did not kidnap her. (5/10/16 RP 31). He did not try to rape her. (5/10/16 RP 31;39). She did not remember testifying that he attempted to touch her vagina. (5/10/16 RP 40). She also testified that when she was attempting to climb on Mr. McElfish's computer he told her to get off of it; he did not tell she could not leave or try to pull her down. (5/10/16 RP 24).

In its oral ruling, the court found the written declaration submitted by Miranda was not completely reliable. (5/10/16 RP 66). The court noted, however, that the reliability determination was based on her testimony and not the written declaration. The court found her testimony to be reliable. (5/10/16 RP 66-67).

Having found Miranda's testimony reliable, the court further found that she had recanted, in part: specifically that Mr. McElfish had not touched her in a sexual manner and did not try to rape her. (5/10/16 RP 67). The court also found that Miranda's testimony

placed Mr. McElfish in a far more limited role than at her trial. (5/10/16 RP 66-67). The court analyzed the five *Wiliams*[1] factors finding (1) the changed testimony would probably change the results of a trial if a new trial were granted; (2) as with most or all recantations it follows the trial and thus was discovered since the trial; (3) the evidence could not have been discovered before trial by exercising due diligence; (4) the statements were material and admissible at a new trial; (5) the evidence is neither cumulative nor impeaching in its nature. (5/10/16 RP 68-69). The court entered findings of fact and conclusions of law and ordered a new trial. CP 34-37. The State appealed the trial court decision. CP 32.

III. ARGUMENT

The Trial Court Properly Exercised Its Discretion In Granting A Motion For A New Trial.

1. Standard of Review

A trial court's decision to grant a new trial is reviewed under an abuse of discretion standard. *State v. Hawkins,* 181 Wn.2d 170, 179, 332 P.3d 408 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable

[1] *State v. Williams,* 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

grounds. *Grandmaster Sheng-Yen Lu v. King County,* 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

Where, as here, the trial court has ordered a new trial, the reviewing court requires a much stronger showing of an abuse of discretion to set the order aside, compared to an order denying a new trial. *State v. Slanaker,* 58 Wn.App. 161, 163, 791 P.2d 575 (1990). A trial judge, who has "seen and heard the witnesses, is in a better position to evaluate and adjuge than can [the appellate court] from a cold, printed record " and is given wide discretion whether to grant a new trial. *State v Wilson,* 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

2. The Findings of Fact Were Supported By Substantial Evidence.

Findings of fact are reviewed for substantial evidence. *State v. Garvin,* 166 Wn.2d 242, 249, 207 P.2d 1266 (2009). "Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise." *Id.* Unchallenged findings of fact are verities on appeal. *State v. Broadaway,* 133 Wn.2d 118, 131, 942 P.2d 363 (1997). This Court will not disturb findings of fact that are supported by substantial evidence in the record. *State v. Macon,* 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

The state challenges finding of fact ¶2, which provides:

> At the trial, the alleged victim Cheryl Miranda testified that Brandt Jensen and Ronald Easley took her from the main residence of the home she was visiting to a nearby shop where the defendant resided. She testified that in the defendant's residence she was assaulted by Jensen, forced to disrobe and was tied to a chair with duct tape. She testified that the defendant did not participate in these acts. She testified that while she was restrained, the defendant touched her breasts and vagina.

(CP 35)(Brief of Appellant, p. 10). In support, the state cites the trial testimony of Miranda from March 12, 2014, quoting part of the testimony. The full testimony on direct is as follows:

> Q. Okay. Did he try and touch you anywhere else on your body?
> A. I do remember something about, I don't know, I don't want to talk about it.
> Q. I know you don't want to talk about it. I need you to talk about it.
> A. Well, God, well, you know, that area.
> Q. What do you call that area?
> A. I don't think he really –he just was –
> Q. No, what do we call that area?
> A. Oh, gosh. Do I have to say it? Privates.
> Q. Okay. Is it your vagina?
> A. Yeah, gosh darn it.
> Q. Did he try and touch your vagina?
> A. Just a little – barely.
> Q. Okay. Did he actually touch your vagina?
> A. I can't really put my finger on that because that's just a –
> Q. Did he try?
> A. Yeah.
> Q. Okay.
> A. He might have.

Q. Were you able – or did you try and move when he tried to do that?
A. Yeah.

3/10/14 RP 39.

The original testimony indicates that while hesitant and embarrassed, Miranda stated that Mr. McElfish reached for and barely touched her vagina. Substantial evidence supports the court's finding.

The State challenges finding of fact ¶ 6:

> At the hearing on May 10 she testified she was aware of the contents of the affidavit and that half of the affidavit was incorrect and that half of it was correct.

(CP 35). In support, the State quotes Miranda as saying "It's a lot wrong." (Brief of Appellant, p. 11). During her testimony, Miranda identified 3 inaccurate statements and affirmed 6 of the statements. She affirmed that Mr. McElfish (1) was not involved in bringing her to the shop area; (2) was asleep when she entered; (3) did not hit her or threaten her with any weapons (5/10/16 RP 47); (4) Mr. McElfish was scared of Jensen (5/10/16 RP 31); (5) Jensen kidnapped her; (5/10/16 RP 31); (6) Mr. McElfish did not try to rape her, "Brandt was the on switch, he [McElfish] didn't try to do tha*t*." (5/10/16 RP 31;48). The court's finding regarding the accuracy of the affidavit is supported by substantial evidence.

The State challenges finding of fact ¶8, specifically whether Mr. McElfish touched her in a sexual manner.

> Inconsistent with her testimony at trial, while stating Mr. McElfish touched her breast, she testified that Mr. McElfish did not touch her in a sexual manner. She denied that he touched her vagina and added that at the time of the incident, the defendant appeared to be scared of Jensen. The court finds this testimony to be reliable.

(CP 36)(Br. of Appellant p. 11).

On 3/12/2014, the prosecutor asked Miranda:

> Q. "Did he touch you at any point when you were in the room after you got loose from the chair on your body?
> A. That was when I was still sitting on the chair.
> Q. Okay. So tell me about that.
> A. I don't know. He just kind of like tried – like I don't know, it's –
> Q. Okay Cheryl.
> A. He just – I don't – it's kind of like he touched – he like – I can't really remember specifically, but he like touched my boob or just, you know, tried to – I can't remember. He just kind of – if he was my friend, he wouldn't do that, so it wasn't like –

(3/10/14 RP 37-38).

The clear implication from her testimony was that it was not a 'friendly' touch, but rather, an unwelcome sexual touch. At the May 10, 2016 hearing, under the State's cross- examination Miranda testified as follows:

> Q. You also said just a few moments ago that Donnie didn't really do anything sexual. The question was did he do anything sexual and you said, "not really." What do you mean?

A. I mean, he didn't –I don't know. He—he just – he didn't, like, try to rape me, like, or anything, really.
Q. Did he try to touch you in any other way, besides the touching of your breast?
A. No, but he—when I grabbed his shirt to cover my body with it he said, "give me my shirt," and grabbed it back from me…"
Q, Now, during the trial, at the original trial, you testified that you remembered something about him trying to touch you anywhere else on your body and you said on your privates -- your private area.
A. I don't remember that, I don't –

5/10/16 RP 39-40 (emphasis added).

Miranda was specifically asked whether Mr. McElfish tried to touch her in a sexual way besides touching her breast and she answered "No". When asked if she remembered testifying that he tried to touch her elsewhere, she said she did not remember testifying to that. Further, she specifically testified at the later hearing that he did not do anything sexual to her. (5/10/16 RP 39). Her later testimony was inconsistent with her earlier testimony. The finding of fact is supported by substantial evidence.

The State challenges finding of fact ¶9, relying on *Macon.* (Brief of appellant p.13).

> There was no direct evidence at trial that corroborated the claims made by Miranda. (CP 36).

It is the role of the trial court at a recantation hearing to determine the credibility and reliability of the recanting witness. *State v. York,* 78 Wn.App. 352, 361, 899 P.2d 810 (1995). The existence of independent corroborating evidence "might make the determination easier, but the absence of corroborating evidence does not relieve the trial court of its threshold responsibility." *Id.* Even if, as the state argues, there was direct corroborating evidence at trial, the court is still tasked with making a threshold determination: If a court finds the recantation testimony credible, but there is independent corroborating evidence to support the conviction, "the trial court may grant a new trial or not, it is entirely within the court's discretion." *Id.* Thus, whether independent corroborating evidence exists to support the original testimony of a recanting witness is *not* a controlling factor in determining whether to grant a new trial on the basis of newly discovered evidence. *State v. Ieng,* 87 Wn.App. 873, 881, 942 P.2d 1091(1997).

Here, the state relies on the testimony of other trial witnesses who recounted what Miranda had told them. Such testimony is not direct evidence. Miranda was the sole source of information about the events inside the shop when she was alone with McElfish.

However, even if the court considered other testimonial trial evidence as direct evidence, Deputy Hammer's testimony does not corroborate either Miranda's original testimony or her later testimony. (3/13/14 RP 15). Ms. Cahoun did not personally hear or see what occurred inside the shop. (3/12/14 RP 146;156). Ms. Gaylor did not go down to the shop when only Miranda and McElfish were inside. She did not know what occurred inside the room. (3/12/14 RP 184-186). Merla Paul testified she found Miranda inside of her home. (3/12/14 RP 212). She said Miranda told her, "They took all of her clothes off, duct-taped her to a chair and planned on raping her." (3/12/14 RP 212). Her testimony is not specific as to any involvement by Mr. McElfish, and was her version of the story told to her by Miranda. Further, Miranda specifically testified that Mr. McElfish did *not* order her to remove her clothing, did not duct tape her to the chair, and was *not* going to rape her.

The court rightly made the finding and there is substantial evidence to support it.

The State assigned error to finding of fact ¶ 10, citing there was not substantial evidence to support the finding: "The evidence of recantation was discovered after the trial, and could not have

been discovered prior to trial by exerting due diligence." (CP 36)(Br. of Appellant p.1). However, the state does not provide citation, argument or authority. This Court should decline to address this assignment of error. RAP 10.3(a)(6); *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Unchallenged or improperly challenged findings are verities on appeal. *State v. O'Neill,* 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

3. The Court Properly Exercised Its Discretion When It Found The Recantation Testimony Reliable.

Recantation of trial testimony is generally treated as newly discovered evidence. *Macon,* 128 Wn.2d at 799-800. In exercising its discretion as to whether newly discovered evidence requires a new trial, the trial court must evaluate the credibility, significance, and cogency of the proffered evidence. *State v. Ieng,* 87 Wn.App. at 879-880. The trial court must make its own determination of the credibility of a recanting witness, regardless of whether there is corroborating evidence, and without regard to whether a jury might find the witness credible. *Ieng,* 87 Wn. App. at 880.

A. The state challenges the trial court's Conclusion of law 1:

> The testimony of Miranda on May 10, 2016, and in part the affidavit dated February 18, 2015, constituted a recantation of her trial testimony.

(CP 36)(Brief of Appellant p.14.

This Court limits its review of a superior court's findings of fact to determine whether they are supported by substantial evidence and if so, whether the findings support the conclusions of law. *Macon,* 128 Wn.2d at 799.

The State's contends the trial court's conclusion that Miranda's testimony constituted a recantation is that Miranda did not adhere to the facts in her written statement. (Brief of Appellant p.14). The state cites two cases to support this argument: *State v. Landon,* 69 Wn.App. 83, 848 P.2d 724 (1993) and *State v. D.T.M.,* 78 Wn.App. 216, 896 P.2d 108 (1995) (Brief of Appellant p. 14). The issues in each of those cases are not on point with the case here and do not support the state's argument or conclusion.

In *Landon,* the issue was whether the out of court, unsworn written statement had the same legal effect as an in court recantation made while under oath and subject to cross-examination. *Landon,* 69 Wn.App. at 91. The Court concluded that it did not. There, the witness produced an *unsworn* written

statement disavowing his earlier testimony identifying Landon as the man who shot him. *Landon,* 69 Wn.App. at 87.

The *Landon* Court found that the witness's out of court statement contained facts, which if true, were material. *Id.* at 90. However, the Court held the unsworn statement was insufficient to prompt relief in the nature of a dismissal or a new trial; rather, it entitled Landon to a hearing to determine whether the witness could recant in open court, under oath and subject to cross examination. *Id.* at 93. The defendant had a right to a hearing where both parties could fully and fairly question the witness and, the court could make a determination whether the recantation was credible.

Similarly, in *D.T.M.,* without the witness's statements, the defendant's guilty plea and conviction lacked factual support. *D.T.M.* 78 Wn.App. at 220. Referring to *Landon* the Court, stated, "Although Washington courts have required a new trial when an essential witness recants under oath in open court, they have not always done so when the witness recants by affidavit." *Id.* (citing to *Landon* 69 Wn.App. at 92). Like *Landon,* the Court was remanding for a hearing to evaluate credibility under oath and subject to cross-examination. *D.T.M.,* 78 Wn.App. at 221.

Under *Landon,* and *D.T.M.,* the affidavit is the key that unlocks the door to a hearing. Here, the court properly considered the signed, notarized affidavit, made under penalty of perjury and ordered a hearing. It did not, however, rely solely on the affidavit to order a new trial, but rather, ordered a hearing to allow the parties to take testimony under oath and subject to cross-examination.

Moreover, as specifically argued in the previous section, the trial court found that Miranda's testimony at the 2016 hearing differed from her testimony at trial. As the court stated in its oral ruling, Miranda's latter testimony put McElfish in a far less culpable role than the original testimony. Less culpable enough that the court considered it a credible recantation warranting a new trial. *State v. Eder,* 78 Wn.App. 352, 899 P.2d 810 (1995).

At trial Miranda testified that McElfish touched her vagina. At the recantation hearing she said that he did not and she did not remember testifying otherwise. She testified at both hearings that McElfish touched her breast- but in the later hearing averred that it was not in a sexual manner. Her affidavit stated that McElfish helped to remove the duct tape for her. She testified that he did not do so. However, he did not stop her from removing the duct tape, and in her later testimony, stated that he did not pull her down

when she was climbing to get out through a window. The court was in the best position to determine the credibility of Miranda's testimony, having heard her testimony and having seen her demeanor at each proceeding. *Wilson,* 71 Wn.2d at 899.

The State rightly points out that Mr. McElfish was charged as an accomplice. (Brief of Appellant p.18). Quoting the prosecutor's closing statement at trial, the state contends that McElfish intended to follow through with Jensen's threats *after Miranda was out of the chair.* (Brief of Appellant at 19). However, Miranda's testimony at the recantation hearing was that after she removed the duct tape and got out of the chair, while Mr. McElfish was standing in the room, he did *not* suggest they go to the bed and did *not* try to touch her in a sexual manner. (5/10/16 RP 25-27). She also testified McElfish had been asleep, appeared frightened of Jensen, did not encourage Jensen, did not hit her, did not threaten her, and did not try to rape her. (5/10/16 RP 19; 31).

The trial court's finding of fact ¶ 7, not challenged by the State and thus a verity and binding on appeal, in pertinent part states, "She affirmed that the defendant did not take part or encourage these actions." (CP 36). *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313(1994). The court rightly determined that, as

explained in its oral ruling, Miranda's testimony placed Mr. McElfish in a far less culpable role than she initially did at trial.

This Court should affirm the trial court's conclusion of law 1.

B. The Court Did Not Err When It Found The Affidavit And Testimony Were Credible.

Citing to *Macon,* the state urges this Court to consider the circumstances surrounding the recantation and overrule the trial court's determination of credibility. (Brief of Appellant p. 20). In *Macon,* the trial court considered the circumstances surrounding the incidents in determining whether a young child's recantation was reliable. *State v. Macon,* 128 Wn.2d at 800. The court considered the child's tender age, her possible reasons for recanting, relevant facts at the time of the recantation, and the passage of time between her testimony and her recantation.

The court ultimately concluded the recantation was unreliable, finding her to be a very malleable child who had been pressured to recant by her mother. Her original testimony, which had been corroborated by medical evidence, documented by behavioral changes, and statements to others shortly after the abuse all pointed toward unreliable recantation testimony. *Id.* at 803. The court added, however, that whether there is independent

corroborating evidence to support a recanting witness's testimony is not a controlling factor. *Id.* at 802;804.

Here, the court was presented with all the circumstances surrounding the recantation. Miranda testified that she was invited and went to Cindy's house because she was alone, hungry, had a bad day, and the heater in the trailer had broken. (5/10/16 RP 42). She testified that she had spoken to other people about the events of that day, and on the basis of those conversations her friend Cindy prepared the affidavit for her. Miranda said that when she perused the document at Cindy's house she was not feeling well. (5/10/16 RP 42). However, she took the document down to Kalama City Hall and signed it before a notary. She stated that she was "intimidated and scared" by Cindy, but also testified Cindy told her if anything was incorrect that she should correct it. At the hearing she acknowledged the sections that were not accurate and corrected them at that time.

The State attempts to imply that Miranda's recantation was not credible because Miranda reported she was concerned that either Mr. McElfish's friends or Jensen's friends were going to kill her after the trial. (5/10/16 RP 41)(Brief of Appellant p.22). Over two years had passed since the trial and Miranda could not and did

not point to any threats or pressure by others on behalf of Mr. McElfish. (5/10/16 RP 44). Additionally, in the two years since the trial, certain aspects of Miranda's story remained unchanged. The trial court fully considered the circumstances in finding the recantation reliable and did not abuse its discretion. (See Findings of Fact 4-8).

C. The Court Properly Applied The *Williams* Factors.

To obtain a new trial based on newly discovered evidence, a defendant must show that the evidence (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Macon,* 128 Wn.2d at 803-804.

Here, the trial court properly concluded that the jury's verdict was likely influenced by Miranda's original testimony. (CP 36). The record shows that her testimony was the sole evidence as to what occurred inside the shop at the time of the alleged incident. There was no medical evidence, and no other witnesses. A change in her testimony about Mr. McElfish's involvement is significant as it goes to the heart of the charges. When a defendant's conviction is based solely upon the testimony of a recanting witness, and the

trial court determines the recantation is reliable, the trial court *must* grant the defendant's motion for a new trial. *Macon,* 128 Wn.2d at 804.

The state concedes the evidence was discovered after trial and likely could not have been discovered prior to trial. (Brief of Appellant p.23).

The new evidence is material. A defendant is not entitled to a new trial solely because a critical State witness recants important testimony. *Ieng,* 87 Wn.App. at 875. Rather, a defendant must prove the recantation is credible. If it is credible, it is material. *Id.* It is the task of the trial court to exercise its discretion to determine whether a recanting witness is credible and its decision should be accorded great weight. *Macon,* 128 Wn.2d at 801-02. The reviewing court should not disturb a trial court's credibility determination. *Dalton v. State,* 130 Wn.App. 653, 124 P.3d 305 (2005).

Here, the trial court was familiar with the testimony and facts from both the trial and the later hearing. The court understood the circumstances of the affidavit, and determined parts of the affidavit constituted a recantation of the trial testimony. The court also

concluded that Miranda's testimonial recantation was credible, material, admissible and relevant. It did not abuse its discretion.

Lastly, the recantation is not cumulative or impeaching. "Cumulative evidence is additional evidence of the same kind to the same point." *State v. Williams,* 96 Wn.2d at 223-24. In other words, additional evidence of a fact that does not need further support. Here, the purpose of Miranda's testimony is not to corroborate her story or to simply add evidence that had already been established. Her recant testimony differed in material ways from her trial testimony. Additionally, no one else could testify as to what occurred in the shop.

Similarly, the evidence is not merely impeaching. As a rule, newly discovered evidence that functions solely to impeach a witness is insufficient to grant a new trial. *Id.* at 223. However, if new evidence directly contradicts a witness's uncorroborated testimony on an element of the crime, the new evidence may support granting a new trial. *State v. Savaria,* 82 Wn.App. 832, 838, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.,* 150 Wn.2d 604, 80 P.3d 594 (2003).

Here, the new evidence about the facts of the events does not merely impeach. Rather, it provides new evidence that when

viewed in light of the entire record, that Mr. McElfish's conviction was based solely on the testimony of a recanting witness and the trial court determined the recantation was reliable, supports the defendant's motion for a new trial.

The trial court properly applied the *Williams* factors, and did not abuse its discretion in granting the motion for a new trial.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. McElfish respectfully asks this Court to affirm the trial court's ruling granting Mr. McElfish a new trial.

Submitted this 3rd day of January 2017.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Donald McElfish, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on January 3, 2017 to:

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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,	)	Court of Appeals No. 49043-9-II
v.	)	
DONALD MCELFISH, Respondent.	)	CORRECTED CERTIFICATE OF SERVICE

Marie Trombley, attorney for respondent, states that the certificate of service attached to the respondent's brief filed January 3, 2017, did not have a signature and incorrectly stated "Appellant's Brief" rather than "Respondent's Brief". A Corrected Certificate of Service is attached.

Dated: January 4, 2017.

Marie Trombley

s/Marie J. Trombley
WSBA No. 41410
Attorney for Appellant

Marie J. Trombley
Attorney at Law
PO Box 829
Graham, WA 98338
(253)-445-7920

CORRECTED CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Donald McElfish, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Respondent's Brief was sent by first class mail, postage prepaid, on January 3, 2017 to:

Donald McElfish
624 Cloverdale Road
Kalama, WA 98625

Aila Wallace
Deputy Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

Marie Trombley

Marie J. Trombley
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TROMBLEY LAW OFFICE

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Case Name: State v. Donald McElfish

Court of Appeals Case Number: 49043-9

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Affidavit

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Case Name: State v. Donald McElfish

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